sion;[3] and petitioner wants this Court to substitute its judgment for that of the Federal Power Commission, a judgment involving a determination of the commercial value as a hydroelectric site of tribal lands and water rights licensed under special statute[4] to Montana Power Co.[5]

To bring its complaint to this Court, petitioner asserts contract violations.

There were none.

The statutory procedure for a fair hearing, which petitioner seeks to avoid now, is an integral part of the very statute petitioner embraced in 1936 to save its license,[6] a license for what has been developed as petitioner's most valuable hydroelectric site.[7] Petitioner is

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[3] The Commission's opinion is reprinted at pp. 110a-146a, petitioner's appendix. The hearing examiner's opinion and findings were not reproduced by petitioner. They are reported at 38 FPC 766, 790-806 (August 4, 1966).

[4] Act of March 27, 1928, 45 Stat. 200, 212-213. Reprinted at p. 2 of the Tribes' brief in opposition filed in No. 838, October Term, 1970.

[5] Trial commenced October 28, 1965, and concluded November 10, 1965. The record consists of 1348 pages of transcript, 81 exhibits and 37 items by reference from the Commission's files. 38 FPC 766. Sixteen witnesses testified.

[6] See pp. 2-5, Tribes' brief in opposition, October Term, 1970.

[7] The Kerr project (the developed site) represented, at the time of the hearing, 35.75% of petitioner's total installed generating capacity. In critical (low) water years, it supplies 40% of petitioner's total hydroelectric capability, and during medium water years, guarantees 32.05% of petitioner's total hydroelectric generation. During the study period presented at trial, 1958-1964, Kerr contributed approximately 25% of petitioner's total system resources to the earning of petitioner's revenues, while during the same period, minus one year, petitioner's total electric revenues, and the annual charges, by percent thereof, which petitioner paid the Tribes, were:

[Footnote continued on page 3]

in the contradictory position of asking the Court to ignore a provision of a statute it used for its own continuing benefit.

Petitioner's semantic argument[8] is only a complaint over the results of an evidentiary hearing. Petitioner, of course, does not want to pay the Tribes any increased rental,[9] and it has succeeded so far, although almost seven full years have elapsed since the trial.[10] Further, the back payments, when ordered, will bear simple interest at only 4%, whereas the Tribes could have earned 6% or more, compounded.

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[7] [Continued]

"Annual charges as percent of total electric revenue of The Montana Power Company

$238,375

Year	Electric Revenue	(percent)
1959	$31,382,095	0.74
1960	33,651,530	0.69
1961	35,319,552	0.66
1962	37,301,369	0.62
1963	37,395,371	0.62
1964	39,301,704	0.59"

(38 FPC 766)

[8] Petition, pp. 7-10, 17-19.

[9] Petitioner asks this Court to review a decision on value, yet the hearing examiner stated, in rejecting the evidence and testimony of petitioner:

> "In summation, it is evident that the proposals of the Company's witnesses bear little relationship to any realistic determination of the commercial value of the Kerr site. . . ." (38 FPC at 800)

[10] Petitioner still pays the Tribes only $238,375 per year. While this petition is pending, it is costing the Tribes approximately $850.00 a day. See footnote 1, *supra*.

Petitioner's assertions concerning its relationship with the Montana State regulatory agency are not complete.[11]

The Federal Power Commission's order increasing the annual charges was filed on October 4, 1967. Motions for reconsideration were denied on March 22, 1968. In the interim, however, on February 13, 1968, petitioner filed a petition for a rate increase with the Montana Public Service Commission (Docket No. 5698) and asserted it was entitled to the increase, *inter alia*, because "greater payments to the Indians under Kerr rentals have greatly increased the cost of doing business and supplying electric service." The Tribes, of course, had not then and have not yet received a single red cent of the greater payments found due by the Commission, although the Company is now collecting from its customers, through increased rates, the ordered higher rentals it seeks this Court to review and reverse.[12]

CONCLUSION

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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[11] Petition, pp. 20-21.

[12] The Company has been enjoying since January 13, 1969, a rate increase authorized by the Montana Public Service Commission. Order No. 3295, entered January 13, 1969, by the Public Service Commission of the State of Montana, Docket No. 5698, 77 PUR 3d 130 (1969).